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June 8, 2015

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Complaints Examination & Legal Administration  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

OFFICE  
6/11/15

2015 JUN -9 11:56

**Re: Response of Red, White and Blue Fund in MUR 6740**

Dear Mr. Jordan,

This response to the Supplemental Complaint filed in Matter Under Review 6740 is submitted on behalf of Red, White and Blue Fund by the undersigned counsel. The Complainant, Fred Karger, initiated this matter on or about June 13, 2013. Despite being named in Mr. Karger's initial Complaint, Red, White and Blue Fund was not notified by the Commission at that time. Mr. Karger filed a Supplemental Complaint on or about April 2, 2015. Red, White and Blue Fund subsequently was notified by the Commission, by letter dated April 28, 2015, of the filing of this Supplemental Complaint. This response addresses both the Complaint and Supplemental Complaint.

Both the initial Complaint and the Supplemental Complaint suggest that the Complainant believes the Commission undertakes an investigation upon receiving a filed complaint, and perhaps for this reason, the Complainant does little to present actual evidence that there is reason to believe a violation of the Act or Commission regulations occurred. Instead, the Complainant's principle focus is on what he refers to as a "Pay for Play" arrangement that does not appear to implicate any provision of law over which the Commission exercises enforcement jurisdiction.

## **About Red, White and Blue Fund**

Red, White and Blue Fund registered with the Commission on October 7, 2011, as an independent expenditure-only committee. Contrary to assertions made in the Complaint, Red, White and Blue Fund is not, and has never been, "Mr. Santorum's official Super PAC," Complaint at 3, or "Santorum's Red, White and Blue PAC," Complaint at 5. Red, White and Blue Fund has operated independently of candidates and

political party committees at all times from its inception to present day. Red, White and Blue Fund made independent expenditures in support of Senator Santorum's 2012 presidential candidacy, but at no time did Red, White and Blue Fund coordinate any expenditures with Senator Santorum or any other candidate or party committee.

### **The Initial Complaint's Allegations**

The initial Complaint does not reference any provisions of the Act or Commission regulations. Red, White and Blue Fund is not alleged to have had any involvement in the Complaint's central accusations, as detailed on page one of the initial Complaint.

However, the initial Complaint does ask: "Was there coordination between the Santorum for President Campaign and the National Organization for Marriage, the Red White and Blue PAC [sic] and The Families PAC with two of NOM's largest donors John Templeton, Jr. and Terry Caster?" The initial Complaint does not indicate what was allegedly coordinated or how, or what role Red, White and Blue Fund played in the alleged coordination scheme. Whatever the Complainant may mean here, the question posed does not allege a "coordination" violation that is cognizable under the Act. The Act regulates and restricts coordinated expenditures and coordinated communications, and there is no suggestion anywhere in the initial Complaint that Red, White and Blue Fund paid for communications in coordination with the Santorum campaign.

### **The Supplemental Complaint's Allegations**

Nearly two years after filing the initial Complaint, Mr. Karger filed a Supplemental Complaint. Like the initial Complaint, the Supplemental Complaint does not reference any provisions of the Act or Commission regulations. However, the Supplemental Complaint contains vague allegations of "coordination" between Red, White and Blue Fund, Senator Santorum's 2012 presidential campaign committee, and Mr. Foster Friess. Mr. Karger's coordination allegations are very general in nature – he does not identify a single communication or expenditure that might constitute a "coordination communication," or otherwise explain how any particular activity violated a provision of the Act or Commission regulations.

The Supplemental Complaint relies exclusively on media reports discussing the role of Foster Friess in the 2012 elections. Mr. Friess contributed funds to Red, White and Blue Fund, as disclosure reports filed with the Commission detail, and which was widely reported at the time. There was nothing secretive about Mr. Friess' role as a contributor to Red, White and Blue Fund. Over three years ago, Mr. Friess told reporters that he "told the operatives running the Super PAC [Red, White and Blue Fund] that 'any money that I'm connected to, I want the ads to be dignified, and I want them to be honest. I'm fine with contrast ads, but I'm very, very adverse to some of the ads that I think are destructive.'" Kenneth P. Vogel, 3 billionaires who'll drag out the race, *Politico* (Jan. 12, 2012). According to another report: "And though Friess said he's asked Red, White and

Blue Fund not to use his cash on negative ads, and suggested he'd like its ads to focus on Santorum's work against Islamic extremism, he said he has nothing to do with the Super PAC's advertising strategy." Kenneth P. Vogel, Super PACs echo parodies, *Politico* (Feb. 13, 2012).

There is no evidence that suggests in any way that Mr. Friess' expressed preference was conveyed at the request or behest of the Santorum campaign. To the contrary, all available evidence indicates that Mr. Friess was simply conveying his *own* advertising preference. Aside from this basic instruction, there is no evidence that Mr. Friess in any way impacted or directed the specific content of any Red, White and Blue Fund advertising. According to the Complaint's attached materials, Mr. Friess stated: "I have so little control over the Super PAC; all I did was write a check. . . . So I'm not the hands on guy, I like writing the check and then I turn it over to the guys who make it happen." Andrew Rafferty, Major Super PAC donor's public role with Santorum campaign, *NBC News* (Feb. 9, 2012); *see also* Kenneth P. Vogel, Super PACs echo parodies, *Politico* (Feb. 13, 2012) ("I just send the money in and those guys take care of the ads," [Friess] said.').

In reporting on the 2012 election from the campaign finance perspective, most media coverage advanced a collective narrative in which "coordination" was rampant and legal bounds were constantly pushed. For example, one such report told readers that "Friess has been privy to sensitive campaign business, including fundraising figures, and a private conversation this month between Santorum and Gingrich, who complained that his positions were distorted by a pair of Santorum campaign ads." Kenneth P. Vogel, Super PACs echo parodies, *Politico* (Feb. 13, 2012). The implication of wrongdoing is unmistakable, yet neither allegedly "sensitive" "fundraising figures" or a conversation between two candidates about an advertisement that had already aired is a piece of information upon which a coordination finding could ever rest.

To the extent the Supplemental Complaint is read to allege that Red, White and Blue Fund coordinated communications or expenditures with the Santorum campaign, with Mr. Friess somehow serving as a conduit for information, the materials submitted by the Complainant affirmatively indicate otherwise. Mr. Friess and Mr. Santorum both told reporters, on multiple occasions, that they did not discuss the activities of Red, White and Blue Fund. *See, e.g.*, Andrew Rafferty, Major Super PAC donor's public role with Santorum campaign, *NBC News* (Feb. 9, 2012) ("We don't talk about any activity of the Super PAC at all," Santorum said...). Similarly, Mr. Friess was not a conduit for information *from* the Santorum campaign *to* Red, White and Blue Fund. The Executive Director of Red, White and Blue Fund, Nicholas Ryan, did not discuss advertising strategy, or the content of specific advertisements, with Mr. Friess. Decisions regarding the specific content and distribution of Red, White and Blue Fund's advertisements were made by Nicholas Ryan and media vendors retained by Red, White and Blue Fund. *See* Affidavit of Nicholas Ryan.

In sum, there is no evidence that any Red, White and Blue Fund spending was coordinated with the Santorum campaign, either through Mr. Friess (assuming for the

sake of argument that this even presents a viable legal theory for coordination), or otherwise. The Complaints do not identify *any* communication or expenditure that could serve as the basis for an analysis under 11 C.F.R. § 109.21, and there is nothing in either the initial Complaint or the Supplemental Complaint, or any of the attached materials, that shows, or tends to show, that any conduct standard set forth at 11 C.F.R. § 109.21(d) is even implicated.

Sincerely,

A handwritten signature in black ink, appearing to read "Jason Torchinsky", with a stylized flourish at the end.

Jason Torchinsky

Michael Bayes

Counsel to Red, White and Blue Fund

Enclosure